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IN THE

Supreme Court of the United States

OCTOBER TERM 1991

KALITTA FLYING SERVICE, INC.,
CONNIE KALITTA SERVICES, INC.,
Petitioners,

v.

G.S. RASMUSSEN & ASSOCIATES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Petitioners Kalitta Flying Service, Inc. and Connie Kalitta Services, Inc. (hereinafter, collectively "Kalitta")[1] hereby submit their Reply Brief in Support of the Petition for a Writ of Certiorari.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING WILL DISRUPT AND INTERFERE WITH THE FAA'S REGULATORY SCHEME

In its Brief In Opposition ("Opposition"), Respondent G.S. Rasmussen & Associates, Inc. ("Rasmussen") argues that the

[1] As indicated in the Petition, (Petition at 1 n.1), in accordance with Supreme Court Rule No. 29.1, there are no parent companies or subsidiaries of either corporate petitioner.

Court of Appeals' decision did not affect or limit the FAA's authority or practices in any significant way. (Opposition at 5-6.) In particular, Rasmussen contends that the Court of Appeals did nothing more than recognize Rasmussen's right to receive compensation for the transfer of the STC at issue. (*Id.* at 6-7.) Proceeding from this premise, Rasmussen argues that recognizing its right to receive compensation for the transfer of an STC implies no restrictions on the FAA's authority or activities. (*Id.* at 6-13.)

Rasmussen's argument, however, rests upon a fundamental mischaracterization of the substance and scope of the Court of Appeals' decision. Contrary to Rasmussen's assertions, the Court of Appeals did much more than merely recognize the right of Rasmussen to receive compensation for the transfer of the STC at issue.[2] The Court of Appeals held that Rasmussen has the right to prevent all others from using or referring to the STC in applying to the FAA for an airworthiness certificate. (Petition, App. at 14a, 20a-21a.) Rasmussen's ability to transfer its STC and to receive compensation for such transfers is simply not at issue. What is at issue is Rasmussen's right to prevent the world, other than selected transferees and licensees, from using or referring to the STC or the admittedly unprotected underlying ideas disclosed on the face of the STC to obtain an airworthiness certificate.[3]

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[2] A cursory review of the record below makes clear that there was no transfer of the STC or the STC implementation kit to Kalitta. Rasmussen's offer to sell its STC implementation kit to Kalitta for $95,000 was refused. (Petition, App. at 27a.) The issue decided below by the Court of Appeals was whether Rasmussen was entitled to damages for Kalitta's use of a copy of the STC (a public document), its reference to the STC in its application to the FAA, and its use of an uncopyrighted flight manual supplement which Kalitta found in the public domain.

[3] Rasmussen's assertion that it "faces vast claims of liability" as the result of Kalitta's use of the STC, (Opposition at 10 n.8), is unsupported by citation to any applicable case law. Moreover, Rasmussen does not explain how it

Once the substance and scope of the Court of Appeals' decision is understood, it is clear that the result of that decision will be to empower Rasmussen and other STC developers to prevent all others from using or referring to previously issued STCs in applying to the FAA. Although this is not a direct restriction on the power of the FAA, the effect on the FAA's aircraft certification process is nonetheless apparent and substantial. The FAA can fulfill its role to streamline the certification process and ensure safety only in connection with approving or disapproving applications for airworthiness certificates. If Rasmussen and other STC developers have the power to limit the class of airworthiness applicants by preventing or discouraging those applicants from referencing the existence of previously issued STCs, the FAA's certification process will be disrupted.[4]

Moreover, creation of a property interest in an STC also has potentially more direct and intrusive effects upon the FAA's regulatory mission. If an STC developer can prevent an airworthiness applicant from referencing an STC, there is little reason why that developer should not be able to take similar preventative action against the agency itself. Indeed, the Court of Appeals specifically recognized this potential ground for relief.[5]

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could be held liable on any tort theory under the facts of this case. In fact, it is difficult to imagine how Rasmussen could establish such requisites of liability as a duty of care, causation, and privity where Rasmussen could not be shown to have participated in or benefitted from the Kalitta modification of DC-8 aircraft.

[4] For instance, the Court of Appeals' holding would require the FAA to expend its resources reapproving subsequent identical aircraft design modifications. This is plainly an inefficient use of the agency's time.

[5] The Court of Appeals stated that "Rasmussen might have been entitled to bring an APA action challenging the issuance of the STC, had he acted in a timely fashion." (Petition, App. at 9a n.10.)

There is no better example of the disruption of the FAA's certification scheme than this very case. All parties agree that the design modification approved by the FAA in connection with the STC issued to Rasmussen is highly useful and beneficial. Rasmussen's STC is, however, based upon the enormous data, testing, and expenditures attendant to the issuance of the original DC-8 type certificate. The Court of Appeals' grant to a certificate developer of the power to prevent use of that certificate by others means that Rasmussen could have been effectively prevented from obtaining his STC by the developer of the DC-8 type certificate. Since there is no evidence in the record to suggest that Rasmussen obtained the permission of the developer of the original type certificate to use or copy the type certificate in his STC application, Rasmussen's STC is itself apparently the result of "piracy."[6] If the Court of Appeals' ruling is correct, then Rasmussen would have in all likelihood never been able to obtain his STC, and the admittedly useful modification it embodies would not be available to the aviation community.

II. CREATION OF A PROPERTY RIGHT UNDER STATE LAW IN AN STC IS PREEMPTED UNDER THE FEDERAL PATENT AND COPYRIGHT LAWS

Rasmussen attempts to remove this case from the holding of *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), by arguing that recognition of a property interest in the STC does not conflict with the policies underlying the patent laws. (Opposition at 16-18.) Contrary to Rasmussen's assertions, here the recognized property interest conflicts with the strong federal policy requiring the free use of utilitarian ideas, products, processes, and methods in the public domain and is therefore preempted.

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[6] As Rasmussen notes, "[t]he FAA considers STCs to be transferable in the same manner as Type Certificates." (Opposition at 8.) Thus, the Court of Appeals' rationale for recognizing the existence of a property right in an STC extends to a type certificate as well.

Rasmussen did not seek or obtain protection of its design, method, or data under the patent or copyright laws. (Petition, App. at 25a.) Similarly, Kalitta was not contractually bound to compensate Rasmussen for use of the STC. (*Id.*, App. at 27a.) Nonetheless, the Court of Appeals attempted to remedy what it believed was Kalitta's "free-riding" on Rasmussen's efforts through the recognition of a property right in the STC. (*Id.*, App. at 7a-9a, 14a.)

The reasoning employed by the Court of Appeals is in direct conflict with federal patent policy. Under the Court of Appeals' "free-rider" analysis, there is no reason why other property interests should not be recognized in products, processes, or methods which are clearly patentable so long as the inventor expended time and effort developing or discovering those products, processes, or methods. Indeed, the effect of the Court of Appeals' holding will be to provide protection of unlimited duration to patentable ideas in the form of property interests as a reward for invention. Clearly, however, such a result is inherently in conflict with the patent laws. *Cf. Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 489-90 (1974) (trade secret laws not preempted with respect to clearly patentable inventions since protection afforded is far weaker than that afforded under the patent laws).

Bonito Boats makes clear that state laws which substantially interfere with the use of unpatented utilitarian or design conceptions in the public domain are preempted by federal patent policy. 489 U.S. at 156-57. The Court of Appeals' recognition of a property interest in an STC thwarts and disrupts federal patent policy by denying to Kalitta free use of the information it lawfully obtained. *See Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) ("stringent requirements for patent protection seek to assure that ideas in the public domain remain there for the free use of the public").

Unlike the trade secret laws at issue in *Kewanee Oil*, state contract law relating to intellectual property at issue in *Aronson*, and the common-law tort of unfair competition, *see Bonito Boats*, 489 U.S. at 157-58, state property law strikes at the very heart of federal patent policy. If an inventor believes that he will obtain a property right of unlimited duration in an intellectual discovery merely because he expended time and effort, there will be no incentive to seek patent protection. Moreover, the inventor will have the right to exclude the world from using unpatented utilitarian or design conceptions which he has placed into the public domain in contravention of the federal patent laws.

Rasmussen's claim that there is no copyright preemption is similarly flawed. First, its assertion that "[t]he Copyright Act was never intended to preempt all claims arising out of intangible property ... ," (Opposition at 15), is conclusory and proves nothing in the context of this case. In addition, Rasmussen's reliance upon section 301(d) of the Copyright Act, (17 U.S.C. § 301(d)), is equally misplaced. The FAA's authorization to issue type certificates and STCs is not in question here. Rather, the issue is whether the creation of a property right in an STC is preempted by copyright law. Thus, section 301(d) provides no grounds for Rasmussen's assertion that "[t]he Court of Appeals correctly reconciled the federal aviation statutes and FAA regulations with the Copyright Act." (Opposition at 16.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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